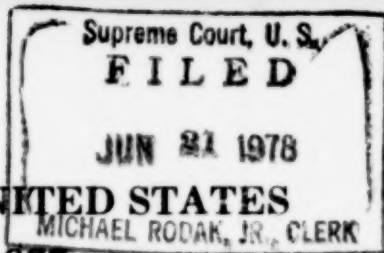


IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977



* * *

No. 77-1163

* * *

DR. E. RICHARD FRIEDMAN, et al.,
Appellants

v.

DR. N. JAY ROGERS, et al.,
Appellees

* * *

ON APPEAL FROM THE UNITED STATES
THREE-JUDGE DISTRICT COURT FOR THE
EASTERN DISTRICT OF TEXAS

* * *

BRIEF FOR THE APPELLANTS

* * *

JOHN L. HILL
Attorney General of Texas

DAVID KENDALL
First Assistant

STEVE BICKERSTAFF
Assistant Attorney General

DOROTHY PRENGLER
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

P.O. Box 12548
Capitol Station
Austin, Texas 78711
(512) 475-3131

June, 1978

*Attorneys for Appellants in their
Official Capacities*

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1977

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No. 77-1163

* * *

DR. E. RICHARD FRIEDMAN, et al.,
Appellants

v.

DR. N. JAY ROGERS, et al.,
Appellees

* * *

BRIEF FOR THE APPELLANTS

* * *

This appeal is from a judgment of the United States Three-Judge District Court for the Eastern District of Texas, entered on October 27, 1977, declaring sections 5.13(d) and 5.09(a) of the Texas Optometry Act, Art. 4552, Tex. Rev. Civ. Stat. Ann., to be unconstitutional in part and enjoining the enforcement of such statutes. The suit was brought on August 25, 1975, by one member of the Texas Optometry Board, Dr. N. Jay Rogers, against the remaining five members of the Board, Dr. E. Richard Friedman, Dr. John Bowen, Dr. Hugh A. Stickse, Jr., Dr. John W. Davis, and Dr. Salvador S. Mora, both in their individual and official capacities. W. J. Dickinson, both individually and as President of the Texas Senior Citizens Association, Port Arthur, Texas Chapter, intervened as a plaintiff in the district court, and the Texas Optometric Association, Inc., intervened as a defendant.

OPINION BELOW

The opinion of the District Court for the Eastern District of Texas, Beaumont Division, entered on September 12, 1977, is reported at 438 F. Supp. 428. A copy of that opinion is reproduced in Appellants' Jurisdictional Statement at A-6 through A-17. The Final Judgment of the Court below, entered on October 27, 1977, is not reported, and that judgment is reproduced in Appellants' Jurisdictional Statement at A-1 through A-5.

JURISDICTION

This suit was brought pursuant to 42 U.S.C. §1983 and 28 U.S.C. §§1331, 1343, 2201, 2281, and 2284 in the United States District Court for the Eastern District of Texas, to enjoin as unconstitutional the enforcement of sections 2.02, 5.09(a), 5.13(d), and 5.15(e) of the Texas Optometry Act [hereinafter the Act]. A three-judge district court was convened to hear this cause as then required by 28 U.S.C. §§2281 and 2284. The final judgment of the court was entered on October 27, 1977. The judgment declared a portion of sections 5.09(a) and 5.13(d) of the Act unconstitutional and enjoined Defendants from enforcing such provisions. Notice of appeal was filed in the court below on December 20, 1977. Appellants' Jurisdictional Statement was filed in this Court on February 16, 1978. Probable Jurisdiction was noted on April 17, 1978 and this case was consolidated with Numbers 77-1164 and 77-1186. 46 U.S.L.W. 3649. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by 28 U.S.C. §§1253 and 2101(b). Jurisdiction is sustained by the following cases which required this case to be heard by a three-judge district court and recognize a direct appeal to this Court from judgments thereof. *Town of Lockport v. Citizens for Community Action*, 430 U.S. 259 (1977); *Ohio Bureau of Employment Services v. Hodorz*,

431 U.S. 471 (1977); *Chapman v. Meier*, 420 U.S. 1, 14 (1975).

STATUTE INVOLVED

The court below held that a portion of section 5.13(d) of the Texas Optometry Act, Article 4552, Vol. 13, Tex. Rev. Civ. Stat. Ann., 449,481, was unconstitutional and enjoined its enforcement. The statute reads, in pertinent part, as follows:

Section 5.13(d). No optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name, or any name other than the name under which he is licensed to practice optometry in Texas

QUESTIONS PRESENTED

- I. Whether the lower court erred in holding Article 4552-5.13(d) unconstitutional under the first amendment as an unwarranted restriction on the free flow of commercial information.
- II. Whether the injunction issued by the court below, enjoining Appellants from enforcing any "provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name", should be vacated on the grounds that it is overbroad, it does not specifically state what action is enjoined, and it encompasses statutory provisions not raised or litigated in the court below.
- III. Whether several Orders Pendente Lite entered by the court below exempting individual optometrists from provisions of the Texas Optometry Act should be vacated because such orders are overbroad, do

not specifically state what provisions the Board is prohibited from enforcing, and encompass issues not raised or litigated in the court below.

STATEMENT OF THE CASE

As noted above, the lower court ruled that sections 5.09(a) and 5.13(d) of Article 4552 were unconstitutional in part. Section 5.09(a) of the Act prohibited price advertising of any kind by optometrists.¹ Even though the facts in the instant case with regard to section 5.09(a) can be distinguished from those in *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) [hereinafter *Bates*], on the grounds that *Bates* involved only price advertising by lawyers in newspapers while Section 5.09(a) prohibited price advertising by optometrists in any media,² the State has elected not to burden this Court with an appeal of the constitutionality of Section 5.09(a). Since Appellants have not appealed the lower court's holding that Section 5.09(a), as a blanket suppression of truthful price advertising, violates the first amendment, optometrists in Texas can now advertise prices of goods and services. On the basis of the State's long experience with regulation of the practice of optometry, however, Appellants believe that

¹Section 5.09(a) reads, in pertinent part, as follows:

No optometrist shall publish or display, or knowingly cause or permit to be published or displayed by newspaper, radio, television, window display, poster, sign, billboard, or any other advertising media, any statement or advertisement of any price offered or charged by him for any ophthalmic services or materials

²This, of course, includes television and radio. This Court held in *Bates* that "[t]he special problems of advertising on the electronic broadcast media will warrant special consideration. . . . The constitutional issue in this case is only whether the state may prevent the publication in a newspaper of appellants' truthful advertising concerning the availability and terms of routine legal services." 433 U.S. at 384.

section 5.13(d), which prohibits the practice of optometry under a trade name, corporate name, assumed name, or any name other than the name under which the optometrist is licensed to practice, is essential to the protection of the public health. Appellants³ therefore appeal the decision of the court below holding section 5.13(d) unconstitutional. Appellants additionally appeal from the Final Judgment below since the injunction issued does not comply with the requirements of Rule 65(d), Federal Rules of Civil Procedure. For this same reason, the Orders Pendente Lite entered by the court below are being appealed.

This suit was originally filed by Dr. N. J. Rogers, one of six members of the Texas Optometry Board, against the five other members of the Board in August 1975. Dr. Roger's Original Complaint, filed in the Beaumont Division of the Eastern District of Texas, challenged sections 5.13(d), 2.02, and 5.15(e) of the Texas Optometry Act as unconstitutional (App. Vol. I, 8 - 17). The Defendants filed a motion to transfer venue to the Western District of Texas, which was and is the official residence of the Texas Optometry Board. The Court denied Defendants' motion and ruled that venue was proper in Beaumont, Texas, the residence of Appellee Dr. Rogers.

Defendant Board members then filed a motion to dismiss for lack of standing to raise the constitutionality of Section 2.02. They also filed a motion for summary judgment which asserted that Dr. Rogers was estopped from challenging the constitutionality of the Texas

³Since the Appellants are all members of the Texas Optometry Board, an agency of the State of Texas, who have been sued in their official capacity, the Appellants will also be hereinafter referred to as the State for purposes of clarity. Furthermore, the State of Texas is the real party in interest of this suit since the constitutionality of a state statute is at issue.

Optometry Act since he had sponsored it and had procured its enactment (App. Vol. III, 227 - 239).

In January of 1976, five months after the suit was originally filed, the court set the case for trial on the merits for February 20, 1976. The depositions of the defendant Board members, as well as Dr. Rogers's deposition, were taken prior to the February 20 setting. At the time the depositions of these Board members were taken by the Plaintiff, counsel for the Defendants assumed that he could call the Board members to the stand at the time of trial.

On February 17, 1976, three days before the February 20th trial setting, the Texas Senior Citizens Association, represented by the same counsel as Dr. Rogers, filed a motion to intervene on behalf of Plaintiff Dr. Rogers (App. Vol. I, 22 - 39). The Senior Citizens group joined in Dr. Rogers's Complaint and also raised, for the first time in the lawsuit, the constitutionality of Section 5.09(a) of the Act, which prohibited price advertising by optometrists. On February 18, 1976, Judge Fisher denied the Senior Citizens' motion to intervene.

At the February 20, 1976 trial setting, the three-judge court instructed the parties that no live testimony would be heard that day, but that counsel would be allowed to present their arguments as to the merits of the case. The court further stated that all evidence would be presented through depositions and other discovery procedures, as opposed to live testimony. The court indicated that they would read the discovery instruments necessary to a proper determination of the issues. With the exception of the three hour hearing held on February 20, 1976, there were no further oral hearings, testimony, or arguments presented to the three judge panel.

On April 9, 1976, after the discovery had been completed pursuant to the court's discovery schedule and three weeks prior to the deadline for filing briefs on the merits, the Texas Senior Citizens Association renewed their previous motion to intervene without citing any additional authority as to why it should be granted (App. Vol. I, 40 - 42). Defendants objected to this motion on the grounds that it was not timely, had previously been denied, and that it prejudiced the Defendants. On June 11, 1976, the court entered an order granting the Senior Citizens' intervention. Thus, the Senior Citizens were allowed to intervene after the majority of the evidence had been adduced. This intervention meant that even if the court granted Defendants' motion to dismiss for lack of standing on the part of Dr. Rogers and motion for summary judgment, the suit would still be maintained by the Senior Citizens as to Section 5.13(d). For these reasons, Defendants have not raised these points on appeal with regard to section 5.13(d) even though the motions were overruled by the court below.

On September 13, 1976, the court entered another order granting leave to the Texas Optometric Association to intervene as a defendant (App. Vol. I, 46 - 47). After the record had been closed and briefs had been filed by the parties, several attempts were made by optometrists in the State to intervene as plaintiffs. These optometrists attempted to intervene only so that they could seek an exemption from the prohibitions of Section 5.13(d) of the Act. Although the court denied each of these optometrists' request for leave to intervene, the court nevertheless entered orders pendente lite exempting these optometrists from "the prohibitions of Section 5.13(d) and like 'trade name' prohibitions of the Texas Optometry Act." (Jurisdictional Statement, A-21 through A-22).

Approximately one year after the record in this case was closed and submitted to the court below, a Memorandum Opinion was issued which upheld sections 2.02 and 5.15(e), and struck down sections 5.13(d) and 5.09(a) as violative of the first amendment. The Court directed counsel to prepare an order in accordance with the Opinion.

The original proposed final judgment submitted by the Plaintiffs ordered that Defendants be "restrained and enjoined from enforcing or attempting to enforce Article 4552 - 5.13(d)" and contained no other language with regard to the issue of trade name prohibition (App. Vol. I, 50-51). Defendants objected to the proposed final judgment primarily on the basis that it was incomplete since it did not specifically uphold sections 2.02 and 5.15(e) (App. Vol. I, 52-58). Plaintiffs then submitted a second proposed final judgment in which, for the first time, they requested that section 5.11 be declared unconstitutional and that Defendants be enjoined from enforcing section 5.13(d) or "any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under trade name." Defendants, of course, vehemently objected to Plaintiffs' attempt to include a section of the statute in the final judgment that was not before the court (App. Vol. I, 59-68). Defendants also objected to the broad language proposed by Plaintiffs that would enjoin the enforcement of "any. . . provision of the Texas Optometry Act which prohibits in any way the practice of optometry under a trade name" on the basis that such language went beyond the scope of the pleadings and was too vague and overbroad. Although Defendants suggested that a hearing be held at which time the court could hear testimony as to the need to include this broad language in the final judgment, (App. Vol. I, 69-70), the court included the language at the request of Plaintiffs without any hearing. The Final Judgment was entered

on October 27, 1977, and all parties filed notices of appeal to the United States Supreme Court.

Defendants' fears regarding the potential problems with the broad language contained in the Final Judgment quickly became a reality. Shortly after the entry of the Final Judgment, the Optometry Board had a meeting at which they discussed the fact that one of Dr. Rogers's optometric offices was in violation of section 5.11 of the Act. Dr. Rogers informed the Board members that section 5.11 was unenforceable under the broad language contained in paragraph two of the Final Judgment since he contended that it prohibited the practice of optometry under a trade name. Dr. Rogers further informed the Board that if any attempts were made to enforce section 5.11 of the Act, he might seek to hold the Board members in contempt of the Final Judgment.

After discussing the matter at several Board meetings with their attorneys, the Board wrote Dr. Rogers and requested that he remove a display of frames from the window of one of his optometric offices since the display violated section 5.11 of the Act. Dr. Rogers refused to voluntarily comply with this request. After being assured by their attorneys that section 5.11 was not at issue or before the court in the instant suit either in the court below or on appeal, the Board requested that the Attorney General's Office enforce section 5.11 at the office in question in whatever manner and at whatever time the Attorney General of Texas deemed appropriate.

Before this request had even been received by the Attorney General from the Optometry Board, Dr. Rogers filed a motion seeking to hold the Board members in contempt of the court's Final Judgment. Dr. Rogers contended, in an affidavit, that the Board members had violated the language of the Final

Judgment on appeal in this Court as well as the portion of the Final Judgment enjoining the enforcement of 5.09(a). Dr. Rogers further requested that additional injunctions be issued by the district court. Before the Board members had an opportunity to respond to this motion, one of the district judges entered an order requiring four of five defendant Board members to appear on June 2, 1978, and show cause why they should not be held in contempt of the court's Final Judgment and why additional injunctions should not be issued. The Board members immediately applied to the district court for an order staying the enforcement of paragraph two of the Final Judgment and staying any contempt proceedings pending a final determination of this case on appeal. Both motions were denied. The Board members then filed an application for stay in this Court,⁴ and the June 2, 1978 contempt hearing was postponed by the district court to allow Justice Powell ample time to review the matter. As of the time this brief was printed, no action had been taken on the application for stay.

SUMMARY OF ARGUMENT

A. The three-judge court below erroneously held that section 5.13(d) was unconstitutional under the first amendment as an unwarranted restriction on the free flow of commercial information. The lower court summarily relied on *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977) and *Virginia Pharmacy Board v. Virginia Consumer Council*, 425 U.S. 748 (1976) [hereinafter *Virginia*], as being dispositive of the issues in the instant suit, and thus failed to sufficiently analyze the facts and the applicable authorities.

⁴For a more detailed discussion see the Application for Stay and related exhibits filed in this Court, in 77-1163, on May 30, 1978.

Section 5.13(d) provides that an optometrist must practice under his own name and not under an assumed name; it does not prohibit him from advertising. There is no provision in the Act to prohibit an optometrist from advertising any truthful information that he wishes to advertise, including the price of goods and services, as long as he advertises in his own name. The most significant effect section 5.13(d) might have on advertising is that it would require an advertising optometrist to reveal his true identity to the public. The statute requires only that an optometrist practice out in the open under his own name. Section 5.13(d) was created to provide the public with complete information about the identity of the doctor performing health care services. The public receives *more* information when the optometrist must practice and advertise under his own name. The *Bates* decision does not mandate that section 5.13(d) is unconstitutional; rather, *Bates* recognizes the need for laws which insure that the public is as fully informed as possible.

In the instant case, the State presented evidence that the control over individual optometrists by the trade name owner, the volume of patients each doctor is encouraged to see in a trade name practice, the eroding of the doctor-patient relationship, and the pressures to accept inferior lab work from optical companies with ties to the trade name owner, increase the likelihood that patients who patronize optometrists practicing under a trade name will receive poor quality health care.

Furthermore, section 5.13(d) is constitutional as a regulation of conduct which is based upon legitimate and important state interests. By applying the first amendment to regulations of conduct rather than expression, the court below has intruded upon the State's well recognized authority to protect its citizens through rational regulation of its health care

professions. It is difficult to perceive the limits of a ruling which holds that a mode of business organization, which has been prohibited by the State, conveys "commercial information." Any restriction upon first amendment rights is incidental and does not significantly restrict the flow of information. Even if any information is indeed restricted under section 5.13(d), the statute should be upheld as a reasonable restriction upon the manner of expression.

The lower court included the use of a trade name within the protective fold of advertising by reasoning that "people identify the name with a certain quality of service and goods, the end result being that eventually the name itself calls public attention to the product" (Jurisdictional Statement, A-10). The lower court's reliance upon first amendment protection of information concerning quality of services ignores this Court's statements in *Bates* and requires reversal of the result reached by the lower court in its application of the balancing test.

B. The injunction issued by the court below enjoins Appellants from enforcing section 5.13(d) or "any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name." This language violates Rule 65(d), Federal Rules of Civil Procedure, because it is too vague, too overbroad, and it enjoins the enforcement of unidentifiable provisions of the statute not before the court. Appellants have already been ordered by the lower court to appear and show cause why they should not be held in contempt of this language. As this Court held in *Schmidt v. Lessard*, 414 U.S. 473 (1974), "[s]ince an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." 414 U.S. at 476. The order in this

case, just as in *Schmidt*, is not specific in terms and does not describe in reasonable detail what acts are enjoined. Consequently, that portion of the Final Judgment should be vacated for the same reasons the order in *Schmidt* was vacated.

ARGUMENT AND AUTHORITIES

I. THE LOWER COURT ERRED IN RULING THAT THE PROHIBITION OF PRACTICE UNDER A TRADE NAME IS VIOLATIVE OF THE FIRST AMENDMENT

A. GENERALLY

1. The Statute and its History

The prohibition of the practice of optometry under a trade name was originally adopted by the Optometry Board in 1959 as a part of the Professional Responsibility Rule. This action was taken subsequent to the overwhelming vote (542 to 31) of optometrists licensed in Texas (Deposition of Dr. N. J. Rogers taken April 6, 1976 [hereinafter Rogers II] at Exhibit 9). The purpose of the "Professional Responsibility Rule" was to emphasize professional responsibility on the part of the doctor, foster the doctor-patient relationship, and promote high quality patient care (App. 207-208). Appellee Dr. Rogers, together with his brother and another trade name owner, filed suit challenging the Rule. After extensive testimony, the Rule was upheld on the basis that the use of trade name by optometrists had been abused to the detriment of the public. *Texas State Board of Examiners in Optometry v. Carp*, 412 S.W.2d 307 (Tex. 1967), *cert. denied*, 389 U.S. 52 (1967) [hereinafter *Carp*].

Appellees alleged in their motion to affirm at page 13 that Appellants had "scrupulously omitted. . . several

significant items" in their Jurisdictional Statement of which this Court should be aware. Appellees then stated that the Professional Responsibility Rule was repealed by the Board prior to the 1969 legislative session. Appellees, however, have failed to state the circumstances surrounding this purported repeal of the Rule.

In 1967, there was a period of time in which Appellee Dr. Rogers was elected President of the Optometry Board at a meeting at which a quorum was not present⁵ (Rogers Dep. II at Exhibit 2). At that time the Board's administrative rules provided that the president of the Board could submit matters requiring action by the Board in the interim between meetings to a mail ballot of all Board members. In August of 1967, Dr. Rogers caused a purported mail ballot to be sent out on the question of whether the Professional Responsibility Rule should be repealed. Only the three members who had been at the meeting at which Dr. Rogers had been elected President voted on the mail ballot, with all three voting for the repeal of the Professional Responsibility Rule (Rogers Dep. II at Exhibit 3). Mr. Thomas Gee, the Board's attorney, concluded that this attempt to repeal the Rule was not valid since no member other than a duly elected president or vice-president had the authority to determine upon and make a mail submission. Mr. Gee concluded that the Rule was still in full effect and had not been validly repealed (Rogers Dep. II at Exhibit 6). Dr. Rogers refused to accept this determination by the Board's attorney and so informed all optometrists (Rogers Dep. II at Exhibit 8).

When the Legislature convened in 1969, the nominations of the two Board members who had elected

⁵Three members, including Dr. Rogers, were present. The statute required four members of the Board to constitute a quorum for the transaction of business.

Dr. Rogers and voted for the repeal of the Professional Responsibility Rule were rejected by the Legislature (Rogers Dep. II at Exhibits 10, 11). Representatives from the optometric profession conferred with various state legislators with a view towards adopting a new optometry act. The committee of optometrists, which included Appellee Dr. Rogers, agreed to submit certain matters in controversy to an arbitrator and to be bound by his determination. The end result was the codification of the Professional Responsibility Rule by the Legislature in 1969.⁷

2. The Memorandum Opinion of the Court Below

The lower court offered two justifications for its holding that section 5.13(d) violated the first amendment. First, a trade name is encompassed within the meaning of advertising since trade names call public attention to the product: "people identify the name with a certain quality of service and goods" (Jurisdictional Statement, A-10). Second, the use of a trade name is protected "as part of the consuming public's right to valuable information. . . as to certain standards and quality and availability of particular routine services" (Jurisdictional Statement, A-10). In reliance upon *Bates* and *Virginia, supra*, the lower court held Section 5.13(d) violative of the first amendment. In so doing, the court failed to analyze sufficiently both the facts of the case at bar and the applicable authorities. Section 5.13(d) is constitutional as a regulation of conduct which is based upon legitimate and important state interests. Any

⁶Members of the Legislature were aware of the attempted repeal of the Rule (App. Vol. III, 236-237).

⁷Compare Rogers Dep. II, Exhibit 9 with Article 4552-5.13, TEX. REV. CIV. STAT. ANN.

restriction upon first amendment rights is incidental and does not significantly restrict the flow of information. Furthermore, Section 5.13(d) should be upheld as a reasonable restriction upon the manner of expression.

There is no doubt that Section 5.13(d) is not violative of the equal protection clause or the due process clause of the fourteenth amendment. The State has clearly satisfied the requirements of the Constitution that its regulation of the optometric profession be rationally related to the public welfare. *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955); *Carp, supra*; *South Carolina Board of Examiners in Optometry v. Cohen*, 180 S.E.2d 650 (S.C. 1971); *See City of New Orleans v. Duke*, 427 U.S. 297 (1976); *Matthews v. Lucas*, 427 U.S. 495 (1976). The issue thus becomes whether this otherwise valid restriction upon the conduct of a licensee is violative of the first amendment.

The court below purportedly relied on *Bates* and *Virginia* but ignored both the language of those decisions and other applicable rulings of this Court. In *Bates* and *Virginia*, this Court was dealing with statutes which were directed at expression alone; the asserted protection of the public welfare was "protection based in large part on public ignorance." *Virginia, supra* at 769. Since "[t]he advertising ban [did] not directly affect professional standards one way or another," the states involved were clearly suppressing information based on its content. *Virginia, supra* at 769. *See also Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). Neither *Bates* nor *Virginia* involved a statute such as Section 5.13(d), which regulates conduct and which affects freedom of expression only incidentally as a restriction upon manner, not content.

Appellees contend that the district court found, as a matter of fact, that "a trade name is encompassed within

the meaning of advertising" and that "the Texas State Optical name [TSO] has come to communicate standards of price and quality, and availability of particular routine services." Appellees further argue that nowhere in their Jurisdictional Statement did Appellants attack the trial court's *factual* findings as clearly erroneous (Motion to Affirm at 17-18). However, the constitutionality of a statute is a question of law, not one of fact. The lower court balanced the competing interests involved and ruled that Appellees' arguments were more persuasive. The court set out the arguments proposed by Appellees to include trade names within the protective fold of advertising, then set out Appellees' arguments as to why there is a first amendment right to use a trade name as part of the consuming public's right to valuable information. The court found that both arguments were persuasive and that, in applying the rationale of the advertising cases to the trade name question, the blanket suppression of the use of trade names resulted in an unwarranted restriction of the free flow of commercial information. The court's holding was based on questions of law, and did not comprise findings of fact by the court. The court applied legal analysis to the facts presented by all the parties and held, as a matter of law, that 5.13(d) violated the first amendment.

Even assuming there was an underlying fact finding by the lower court⁸ that "TSO has come to communicate to the consuming public information as to certain standards of price and quality, and availability of

⁸Appellee contends that the instant case applies only to TSO and bears no significance beyond the immediate parties. He states that if a party is unable to show that his trade name conveys valuable information to the public, he will have no standing to pursue a cause of action (Motion to Affirm, page 10, n.11). Under this analysis, each optometrist wishing to practice under a trade name would have to file his or her own lawsuit.

particular routine services," there is no evidence in the record to support such a finding. Therefore, any such finding by the court would have no support in the evidence and would be clearly erroneous under Rule 52(a), Federal Rules of Civil Procedure.

B. THE LOWER COURT ERRED BY APPLYING THE FIRST AMENDMENT BALANCING TEST

The lower court erred in applying the first amendment to test the constitutionality of section 5.13(d), since that section of the Act prohibits conduct, not speech. The practice of optometry in Texas under a trade name is more than just a means of identification, it connotes an entire manner of practicing optometry. This mode of practicing, more often than not, includes a high volume practice which tends to lead toward poor quality patient care (App. Vol. II, 101-164). The Supreme Court of Texas found that the conduct associated with the practice of optometry under a trade name was detrimental to the public.

[T]he trade or assumed name practice, like fee-splitting, disrupts the optometrist-patient relationship by concealing the identity and burying the responsibility of the licensed optometrist. . . . Dr. Carp operates seventy-one offices in Texas. He advertises them under the following [ten] trade names. . . . From time to time he adds, drops, or changes the trade name at a particular office although the licensed optometrists employed in that office remain the same. He has purchased and practices under their name although they are no longer associated with the respective offices in any manner. Illustrative of Dr. Carp's trade or assumed name practices is the situation that exists in Wichita Falls. Within a two-block area

in that city, Dr. Carp maintains offices operated under the names of Mast Optical, Luck Optical, and Lee Optical. The same supervisor oversees these three offices. Each office dispenses the same optical goods and services and uses the same kind of equipment. Optometrists are shifted from one location to the other. Dr. Carp's advertising represents to the public that these three offices are in competition with each other thereby creating the false impression that they are each independently owned and operated. Similar situations exist in Dallas and El Paso. . . .

The practice of optometry under a trade name is holding out to the public that the trade name is licensed. The result is that the identity of the licensed practicing optometrists is hidden behind the unlicensed trade name. Prescriptions belong to those operating the trade name business rather than the prescribing optometrist. *The practice is confusing and misleading to the public.* [Emphasis added.]

Carp, 412 S.W.2d at 311-13.

Pursuant to the Texas Supreme Court's determination in *Carp*, the Legislature enacted section 5.13(d) which prohibits the *practice* of optometry under a trade name. Any restriction upon the advertising of a trade name is incidental to a prohibition of conduct. In *Pittsburg Press Co. v. Pittsburg Commission on Human Relations*, 413 U.S. 376, 389 (1973), this Court stated that a first amendment interest is "altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity." See *Bates*, 433 U.S. at

384; *California v. LaRue*, 409 U.S. 109 (1972). Similarly, the first amendment "does not remove a business engaged in the communication of information from general laws regulating business practices." *Savage v. Commodity Futures Trading Commission*, 548 F.2d 192, 197 (7th Cir. 1977); *See also Curtis Publishing Co. v. Butts*, 388 U.S. 130, 150 (1967) (opinion of Harlan, J.); *Beneficial Corporation v. Federal Trade Commission*, 542 F.2d 611 (3rd Cir. 1976), *cert. denied*, 430 U.S. 983 (1977). However, Appellee Dr. Rogers after years of effort to avoid a regulation of business conduct held valid by the Supreme Court of Texas, now asserts that, since the conduct expresses "commercial information," the State cannot prohibit it.

In *Pittsburg Press Co.*, *supra*, this Court held that a state need not permit advertising of illegal commercial activity; the ruling of the court below is that a state may not make a commercial activity illegal because it cannot then be advertised. The lower court's holding is an unwarranted and unwise extension of the rulings in *Bates* and *Virginia* and significantly intrudes upon the state's power to regulate its health care professions for the public welfare. A state should be allowed to regulate professional conduct without violating the first amendment when the regulation at issue concerns conduct and does not restrict content of expression. In this context the first amendment interest is "altogether absent." *Pittsburg Press Co.*, 413 U.S. at 389. This Court should reverse the lower court's ruling and make clear that *Bates* and *Virginia* do not disturb the state's long-protected power to regulate businesses, including the conduct of its licensed professionals. *See North Dakota State Board of Pharmacy v. Snyder's Drug Store, Inc.*, 414 U.S. 156 (1973); *Williamson v. Lee Optical Co.*, *supra*; *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

C. THE LOWER COURT ERRED IN ITS APPLICATION OF THE BALANCING TEST

The lack of a cognizable first amendment interest mandates reversal of the lower court's ruling. However, even applying those cases which concern a mixture of conduct and expression, the balance weighs in favor of the State.

The applicable standard upon which to review a regulation of conduct which incidentally affects freedom of expression is stated in *United States v. O'Brien*, 391 U.S. 367, 376-77 (1968).

This Court has held that when "speech" and "nonspeech" elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.

. . . [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

See also Buckley v. Valeo, 424 U.S. 1 (1976); *Younger v. Harris*, 401 U.S. 38, 51 (1971); *Baldwin v. Redwood City*, 540 F.2d 1360 (9th Cir. 1976).

The restriction upon "alleged First Amendment freedoms" in the instant case is certainly incidental. The communication which the lower court viewed as

protected was information concerning a "certain quality of service and goods" and information "as to certain standards and quality and availability of particular routine services" (Jurisdictional Statement at A-10). The reference to goods is inapposite to this case. Opticians, who are not licensed in Texas, market goods and are permitted to practice under a trade name and advertise prices. Information concerning "quality of service" is of little value to the public; the quality of service varies with the skill and judgment of each optometrist. In *Bates* this Court noted that advertising claims as to the quality of services may be so likely to be misleading as to warrant restriction. 433 U.S. at 366. See *Bates*, 433 U.S. at 386 (opinion of Burger, J.), 400 (opinion of Powell, J.). These references were to information concerning the quality of an individual practitioner. To the extent that nondeceptive advertising of "quality of services" by optometrists is possible, it is not prohibited by the State. The only restriction in this regard is that, since practice under a trade name is prohibited, a trade name may not be used to advertise the quality of services of possibly hundreds of optometrists. Even if non-deceptive advertising of "quality of services" by an individual is possible, clearly such an advertisement by a trade name proclaiming the quality of hundreds of individuals would be deceptive *per se*. Thus the lower court's holding that this "quality of service" information is protected by the first amendment goes farther than this Court was expressly *unwilling* to go in *Bates*. Since this case is on the appellate docket, the lower court's holding must be reversed in order to prevent its use as precedent. See *Hicks v. Miranda*, 422 U.S. 332, 344 (1975).

Information concerning the "availability of particular routine services" is admittedly of some value to consumers; however, the lower court referred to no evidence which indicates that the public is presently

deprived of such information. In fact, even before the lower court held the price advertising restriction of section 5.09(a) unconstitutional, optometrists were allowed to advertise information concerning their location, their hours, their specialty, the number of associates they employ, or any other truthful information that they wished to advertise. Without the prohibition of section 5.09(a), a consumer now has access to direct information concerning the price of goods and services; the communication of such information by means other than a trade name is not prohibited.

The availability of this information illustrates the negligible impact of section 5.13(d) on the free flow of commercial information. The prohibition does not restrict content of communication; it does not prevent an optometrist from directly advertising his services or even the quality thereof. What it does is prevent the use of a trade name, which Appellees argue is the most effective means of communication. Leaving aside doubts concerning the inherent inaccuracy of a trade name advertisement for the services of hundreds of practitioners, a "government is [not] compelled to permit the most *effective* means of expression chosen by the citizen." *Vietnam Veterans Against the War v. Morton*, 506 F.2d 53, 58 n. 14 (D.C. Cir. 1974). Section 5.13(d) "leaves open to the disputants other traditional modes of communication." *Carpenters Union v. Ritter's Cafe*, 315 U.S. 722, 728 (1942).

1. The Justifications For The Prohibition

To justify the need for the negligible restriction upon expression involved in section 5.13(d), the State presented compelling evidence of the importance of its interests in prohibiting practice under a trade name. As discussed in the above Statement of the Case, this is not a new problem to the State. In *Carp* the Texas Supreme Court upheld the trade name prohibition in its earlier

form as a board rule and cited abundant authority for its holding. 412 S.W.2d at 312. In the instant case, several witnesses, including a former partner of Dr. Carp, testified that patient care suffers in a trade name optometric practice (App. Vol. II, 101-164). The nature of a trade name optometric practice was explained by Dr. Robert Shannon, a former part-owner in a chain optical company. Dr. Shannon's testimony showed that certain evils are more prevalent in a trade name practice than in a situation where an optometrist practices under his own name. These evils include excessive control over individual optometrists by owners of the trade name (App. Vol. I, 71-98), an emphasis on volume rather than quality in patient care (App. Vol. II, 107, 123-131), the erosion of the doctor-patient relationship (App. Vol. II, 112-113), and pressures on the optometrist to accept inferior lab work from optical companies with ties to the owner of the trade name (App. Vol. II, 114). Furthermore, the testimony given in this case showed the damage to a patient that could result when an optometrist improperly performs an eye examination (Deposition of Dr. Nelson Waldman at 22-30). The likelihood that necessary steps in an examination will be omitted is increased when optometrists are under time and volume pressures (App. Vol. III, 308-312). A trade name practice tends to put optometrists under precisely such pressures (App. Vol. II, 138-139).

Section 5.13(d) was also created to provide the public with complete information about the identity of the doctor performing health care services. The public receives *more* information because of section 5.13(d) than they would receive without the trade name prohibition. When an optometrist must practice under his own name, and not hide behind the anonymity of an

assumed name, the patient knows the name of the responsible optometrist. If that patient goes to another optometrist at some future time, the patient is more likely to be able to tell the second optometrist the name of the doctor who previously examined his eyes (App. Vol. II, 112). Transferability of records from one doctor to another is promoted when the patient remembers the name of his previous doctor. If a patient, on the other, visits one of the myriad of TSO offices in the State of Texas, he is more likely to forget, if in fact he ever knew, the name of the doctor who examined him. The office door will say "TSO," the phone will be answered "TSO," and the patient will more than likely know only that he had his eyes examined at TSO.

The State also has an interest in insuring that optometrists do not easily abandon a bad reputation. When an optometrist must practice under the name in which he has been licensed, he will, over the course of his professional career, develop a reputation. Whether this reputation is good or bad, it will follow him throughout his career since, wherever he practices, he must practice under the name in which he has been licensed. If optometrists are permitted to practice under assumed names, they may, in effect, abandon a bad reputation. By requiring an optometrist to practice in his own name, it is likely that the consuming public will be made aware of a particular optometrist's reputation for competence (App. Vol. II, 113).

The State further has an interest in promoting the doctor-patient relationship. This relationship is strengthened when the patient knows the identity of the optometrist treating him. He is more likely to go back to that same optometrist if he is able to develop a personal relationship. The testimony shows that there is little time for developing a doctor-patient relationship in a trade name practice (App. Vol. II, 112-113).

By requiring an optometrist to practice under his own name, the State is giving the public easier access to the name of the responsible optometrist and to the complete reputation of the optometrist. Such information is more truthful and more valuable than that which would be conveyed by a fictitious name. The *Bates* decision does not mandate that section 5.13(d) is unconstitutional; rather, *Bates* recognizes the need for laws which insure the public is as fully informed as possible.

2. The Nature Of Information Conveyed

The deceptive nature of a multi-office trade name optometric practice as well as the damages to the public health incident thereto led the state to prohibit practice under a trade name. Contrary to Appellees' rhetoric, the use of a trade name is a merchandising method aimed at securing a large volume business through trade name advertisement. In *Williamson v. Lee Optical Co.*, 348 U.S. 490 (1955), this Court stated:

We see no constitutional reason why a State may not treat all who deal with the human eye as members of a profession who should use no merchandising methods for obtaining customers.

Id. at 490. Appellees assert and the lower court apparently agreed that the recent commercial speech cases have effectively eroded this statement. The error in this view is basic. *Bates* and *Virginia* were decided on the basis of the consumer's right to factual information regarding prices. The effectiveness of any merchandising method and its resultant value⁹ to the

⁹Appellee's arguments regarding the value of the trade name to its owner are relevant only in that they demonstrate that the use of a trade name is a merchandising method commonly used in selling fungible products (Motion to Affirm at 46-52). That trade names may be protected by law from appropriation has nothing to do with the question of whether the first amendment protects their use.

seller are not relevant to a first amendment analysis. The issues consist of the nature of the information, the degree of first amendment protection, and the interest of the State in mitigation thereof.

In *Virginia*, the information sought to be repressed consisted of the price of prescription drugs -- a product. This was purely factual information which had no direct relationship to the technical practice or business organization of pharmacists. While price advertising is a merchandising method, the Court saw importance only in the nature of the information involved and its utility to the consuming public. The Court further found the State's interest to be inadequate to justify the restriction, noting that price advertising had not been shown to affect the actual practice of a pharmacist. In light of the uniformity of pharmaceutical products, there was no showing that the public health could reasonably be endangered by price advertising or a resultant volume operation. Similarly, *Bates* involved only price advertising of "routine" services. It did not extend first amendment protection to all merchandising methods. The Court carefully examined the nature of the communication and the interest of the state in prohibiting it. In both *Bates* and *Virginia*, the Court relied heavily on the absolute prohibition of the content of the communication and noted that reasonable time, place, and manner restrictions might be proper. 433 U.S. at 384.

Section 5.13(d) may be viewed as a valid restriction on the manner of expression. This Court has often approved restrictions of this kind, provided that they are justified without reference to the content of the regulated speech, that they serve a significant governmental interest, and that they leave open ample alternative channels for communication of the

information. *Virginia, supra* at 771; *Bates*, 433 U.S. at 384; *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976); *Breard v. Alexandria*, 341 U.S. 622 (1951). The lower court impliedly recognized that a trade name in itself is meaningless by stating that the information communicated concerned quality and availability of services. The State has placed no other restrictions on communication of this information other than to prohibit deception. The justification for the prohibition here is totally independent from the content of the information allegedly communicated by a trade name; the interest served is among the most significant—protection of public health; and ample alternative channels are left open, including direct advertisement of the information itself. When one views the direct prohibitions upon communication which have been upheld by the federal courts, it would seem anomalous for a statute, which only restricts one manner of communication incident to the protection of public health, to be held violative of the first amendment. See *Pittsburg Press Co. v. Pittsburg Commission on Human Relations, supra*; *Carpenters Union v. Ritter's Cafe, supra*; *Savage v. Commodity Futures Trading Commission, supra*; *Beneficial Corp. v. Federal Trading Commission, supra*; *Mitchell v. King*, 537 F.2d 385 (10th Cir. 1976). Certainly the State should be allowed to implement a "prophylactic solution instead of one that would have required its own personnel" to attempt the awesome task of insuring that doctors of optometry do not submit to the inherent pressures of a trade name practice to the detriment of their patients. *California v. LaRue*, 409 U.S. 109, 116; *Bates*, 433 U.S. at 387 (opinion of Burger, J.), 396 (opinion of Powell, J.). In any event, the primary evils of trade names coupled with the resultant state policy in favor of practice under the licensed name, are sufficient to justify the minimal restriction upon expression.

This case, unlike *Bates* or *Virginia*, involves a regulation directly aimed at maintaining high professional standards of *practice*. This Court has long deferred to states in the regulation of practice of the professions for "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975), citing *United States v. Oregon State Medical Society*, 343 U.S. 326, 336 (1952). The lower court erred in overbalancing a negligible restriction upon the flow of "commercial information" against the interest of the State in maintaining high quality health care. The lower court failed to recognize that "a different degree of protection is necessary" in the commercial speech context. *Virginia, supra* at 771 n. 24; *Bates, supra* 433 U.S. at 384; See also *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

II. THE INJUNCTION AND ORDERS PENDENTE LITE ENTERED BY THE COURT SHOULD BE VACATED BECAUSE THEY ARE OVERBROAD

Paragraph 2 of the Final Judgment issued by the district court enjoins Appellants from enforcing section 5.13(d) of the Texas Optometry Act in the following language:

Section 5.13(d) of the Texas Optometry Act of Article 4552, Revised Civil Statutes of Texas is declared unconstitutional under the First Amendment of the United States Constitution insofar as it provides that "[n]o optometrist shall practice or continue to practice optometry under, or use in connection with his practice of optometry, any assumed name, corporate name, trade name or any name other than the name under which he is licensed to practice optometry in Texas." Members of the Texas

Optometry Board and their successors in office are restrained and enjoined from enforcing or attempting to enforce same, *or any other provision of the said Texas Optometry Act which prohibits in any way the practice of optometry under a trade name.* [emphasis added].

(Jurisdictional Statement at A-3). The only trade name provision raised by the pleadings or litigated by the parties was section 5.13(d). Furthermore, in its Memorandum Opinion, the court did not discuss or even make reference to any other provision of Act which prohibits in any way the practice of optometry under a trade name. Under the requirements of Rule 65(d), Federal Rules of Civil Procedure, every order granting an injunction and every restraining order must set forth the reasons for its issuance, must be specific in terms, and must describe in reasonable detail, without reference to the complaint or other documents, the acts sought to be restrained. The injunction issued by the court below is deficient in all these respects.

In *United Transportation Union v. State Bar of Michigan*, 401 U.S. 576, 581 (1971), this Court stated that an injunction decree must relate "specifically and exclusively to the pleadings and the proof." In the instant case, the Appellee's complaint challenged only section 5.13(d) as prohibiting the practice of optometry under a trade name. Appellants were never apprised at any time during the trial of this cause that any "other provisions" were being challenged. Rather, the first indication that the enforcement of other provisions of the Act not raised in the pleadings was sought to be enjoined was contained in Appellee's second proposed final judgment filed with the court subsequent to the court's issuance of the Memorandum Opinion.

It is fundamental that relief granted by the court in any proceeding must be within "the framework of the

pleadings [and] the evidence." *Korematsu v. United States*, 323 U.S. 214, 222, (1944) [hereinafter *Korematsu*]. See *Solesbee v. Balkcom*, 339 U.S. 9, 11 (1950). *Korematsu* is not, as Appellees contended in their Motion to Affirm, a case in which the lower court framed an overbroad decree which had the effect of invading constitutionally protected rights. Rather, this Court was asked to pass upon constitutional questions not contained within the framework of the pleadings and the evidence and which went beyond the issues raised at trial. In the instant case, the court below passed on issues that were not litigated at trial. It deviated from the established policy of considering only those issues necessarily raised by the record. In one very ambiguous and vague sentence the district court has, in effect, enjoined the Texas Optometry Board from enforcing valid provisions of the Act, without specifying, in the Final Judgment or otherwise, which provisions are enjoined. Appellees presented no evidence to show that any provisions of the Act, other than section 5.13(d), in any way prohibit the practice of optometry under a trade name; Appellants were never given an opportunity to defend against such unalleged contentions. The only provisions at issue in the suit were sections 2.02, 5.13(d), 5.09(a) and 5.15(e).

Appellees contend that the issue of "other provisions" was tried by consent. However, even under a liberal application of Rules 15(b) and 54(c), this assertion is totally without merit. No court has ever held that a State had defended the constitutionality of a statute by consent when the State was never apprised of which statute was being attacked. If Appellees' reasoning is extended to its extreme limits, sections of the statute which Appellees contend prohibit the practice of optometry under a trade name *in any way* would be unenforceable even if the main purpose of the statute was unrelated to practice of optometry under a trade

name. This could include sections of the statute designed to protect the public, such as the second part of section 5.09(a) which prohibits misleading advertising or section 5.08 which prohibits optometrists from practicing while suffering from a contagious disease. Although these statutes affect all optometrists by restricting their practice for the protection of the public, an optometrist practicing under a trade name could argue that they not be enforced because they *in some way* restrict his practice of optometry under a trade name.

Section 5.13(d) was the only provision attacked as a "trade name" provision. The inclusion of other trade name provisions in the Final Judgment was prejudicial to Appellants. If other provisions had been challenged in the pleadings, Appellants would have had an opportunity to demonstrate that these provisions did not have the effect of prohibiting the practice of optometry under a trade name. As it stands now, Appellants will have this opportunity only at a contempt proceeding. Appellants were deprived of their day in court on this issue. Also, if these "other provisions" had been litigated, Appellants would know which sections of the statute they are now enjoined from enforcing; they would not have the threat of a contempt proceeding held over their head when they attempted to enforce valid provisions of the Act (*see* Statement of the Case above and Application for Stay filed in this cause on May 30, 1978).

In *Schmidt v. Lessard*, 414 U.S. 473 (1974) [hereinafter *Schmidt*], plaintiff challenged the constitutionality of Wisconsin's involuntary commitment laws. The district court held generally that the statutory scheme was unconstitutional and that the plaintiff and her class were entitled to injunctive relief.

This Court held that the order failed to satisfy the second and third clauses of Rule 65(d).

[T]he specificity provisions of Rule 65(d) are no mere technical requirements. The Rule was designed to prevent uncertainty and confusion on the part of those faced with injunctive orders, and to avoid the possible founding of a contempt citation on a decree too vague to be understood. . . . Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed.

414 U.S. at 476. The order in this case, just as in *Schmidt*, is not specific in terms and does not describe in reasonable detail what acts are enjoined. Consequently that portion of the Final Judgment should be vacated for the same reasons the order in *Schmidt* was vacated.

In responding to Appellants' Jurisdictional Statement, Appellees have cited no case in which this Court has held it proper to grant relief on issues that were not raised at trial. In *Green v. Connally*, 330 F. Supp. 1150 (D.D.C. 1971, Three-Judge Court), *aff'd sub nom* *Coit v. Green*, 92 S.Ct. 564 (1971), the plaintiffs brought suit to enjoin the IRS from according tax-exempt status to racially segregated private schools. After the three-judge court had granted a preliminary injunction, the IRS changed its policy, and announced that it would no longer extend tax-exempt status to such schools. The district court agreed with this new construction of the Internal Revenue Code and issued an injunction containing affirmative directives to insure that no racially-segregated school would be classified as tax-exempt. The issue upon which relief was granted had been raised by the parties and considered in litigation. *Porter v. Warner Holding Co.*, 328 U.S. 395

(1946), was a suit for enforcement of the Emergency Price Control Act. The Court held that the statutory provisions for remedies did not impair traditional equity powers, and that the court could go beyond those remedies in framing its decree. It did not hold that a court could go beyond the framework of the pleadings and the evidence. *Alexander v. Hillman*, 296 U.S. 222 (1935) stands for the basic proposition that a person not a party to an original decree submits himself to the jurisdiction of the court by presenting a counterclaim. The Court held that the trial court should "decide all matters in dispute." 296 U.S. at 242. In this case, the only trade name provision in dispute was section 5.13(d). The court below had no authority to decide other issues not raised by Appellees either in their pleadings or at trial. Only after a Memorandum Opinion had been issued by the court did Appellees realize that they had not asked for in their pleadings nor received in the Opinion all the relief they desired, and only then did they attempt to include broad, nonspecific language in the injunction.

The Texas Optometry Board has been put in the position of having the duty under the laws of the State of Texas to enforce the provisions of the Act, but of not knowing which sections of the Act the Final Judgment enjoins them from enforcing. Furthermore, the possibility of a contempt proceeding has become a reality. In *International Longshoremen's Association, Local 1291 v. Philadelphia*, 389 U.S. 64, 76 (1967), this Court emphasized the importance of Rule 65(d):

The judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one. Congress responded to that danger by requiring that a federal court frame its orders so that those who must obey them will know what the Court intends and what it means to forbid.

As set out previously in the Statement of the Case, the Board members have already been cited to appear and show cause why they should not be held in contempt of this broad language of paragraph 2 of the Final Judgment, for attempting to enforce section 5.11 of the Act. This section, which forbids certain types of window displays and signs in an optometric office, restricts activities other than the practice of optometry under a trade name. An optometrist could easily practice optometry under a trade name without violating section 5.11 of the Act. The harm Appellants have suffered from this broad language is not speculative -- they face the possibility of being held in contempt of an injunction too vague to be understood.

The strict interpretation of Rule 65(d) is particularly applicable when the actions of a state administrative body are involved. In *Gunn v. University Committee to End the War in Viet Nam*, 399 U.S. 383, 389, (1970), the Court said that compliance with Rule 65(d) "is absolutely vital in a case where a federal court is asked to nullify a law duly enacted by a sovereign state." The district court's order in this case threatens to paralyze enforcement of the statutory scheme for regulation of the practice of optometry. The Final Judgment is so vague that any unrelated provision could be construed by the court to fall under the heading of "other provisions." This situation renders the Board unable to effectively carry out its statutory duties. If this case is not reversed on the merits, the Final Judgment should be vacated, and the case remanded to the district court with instructions to limit the scope of the injunction to the issues raised at trial and to set forth specifically which sections of the Act are declared unconstitutional.

During the course of the trial of this cause, the district court issued a number of "Orders Pendente Lite," a representative copy of which has been reproduced in the

Jurisdictional Statement at A-21 through A-22. These orders exempted specified optometrists, none of whom were parties to this suit, from certain provisions of the Act. The court below had no authority to issue these exemptions to non-parties, and the language in the orders was too broad for all the reasons previously stated with regard to the Final Judgment.

Some of the optometrists named in the orders Pendente Lite had sought leave to intervene. Although intervention was denied by the court below, the court granted the relief these optometrists had sought, thereby granting preliminary relief to persons not parties to the suit. These orders also violated Rule 65(d) because they were, in effect, injunctions issued against the Board to restrain them from enforcing provisions of the Act. Similar to the Final Judgment, the Orders Pendente Lite exempted the named optometrists from the provisions of §5.13(d) and "like trade name prohibitions." These orders suffer the same basic defect as the Final Judgment. The Optometry Board does not know which provisions of the Act it can enforce against these persons. Accordingly, the "Orders Pendente Lite" should be vacated.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court below declaring section 5.13(d) of Act to be unconstitutional be reversed, or, in the alternative, that the Final Judgment and/or the Orders Pendente Lite be vacated.

Respectfully submitted,

JOHN L. HILL
Attorney General of Texas

DAVID M. KENDALL
First Assistant

STEVE BICKERSTAFF
Assistant Attorney General

DOROTHY PRENGLER
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

P.O. Box 12548, Capitol Station
Texas 78711
(512) 475-3131

*Attorneys For Appellants In
Their Official Capacity*

DOROTHY PRENGLER
Assistant Attorney General

RICHARD ARNETT
Assistant Attorney General

CERTIFICATE OF SERVICE

I, Dorothy Pregler, a member of the Bar of the Supreme Court of the United States, do hereby certify that three copies of the foregoing Brief for the Appellants have been served on all parties required to be served by placing same in the United States Mail, First Class, Certified and Postage Prepaid on this ___ day of June, 1978, addressed to each of the following:

Mr. Robert Q. Keith
Attorney at Law
1400 San Jacinto Bldg.
Beaumont, Texas 77701

Mr. Larry Niemann
Attorney at Law
1210 American Bank Tower
Austin, Texas 78701

Mr. John G. Tucker
Attorney at Law
Beaumont Savings Bldg.
5th Floor
Beaumont, Texas 77701

DOROTHY PRENGLER